Chang Sean Pong Eddie & Anor v TVS SCS Malaysia Sdn Bhd (formerly known as Pan Asia Logistics Malaysia Sdn Bhd)

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12BNCC-4–03 OF 2023
TEE GEOK HOCK J
20 JULY 2023

Civil Procedure — Appeal — Appeal against decision of sessions court — Respondent claimed for damages against appellants for breach of fiduciary duties, duty of care and conspiracy resulting losses to respondent and wrongful gains to second appellant's company — Sessions court held appellants liable and awarded damages — Whether sessions court judge had erred in principle, misapprehended facts or failed to take into consideration relevant facts in arriving at decision, thus warranting appellate interference

The first appellant was the managing director of the respondent, while the second appellant was the wife of the first appellant and a director and shareholder of Cargo Elements Sdn Bhd ('CESB'). The respondent which was previously known as Pan Asia Logistics Malaysia Sdn Bhd ('PAL Malaysia') was a subsidiary company of Pan Asia Logistics International Pte Ltd ('PAL International'). The first appellant was bound by the terms and conditions contained in the employment contract including the respondent's delegation of authority ('DOA'). Under the DOA, prior approvals must be obtained before any expenditure, projects or engagements of external parties could be incurred or committed. Specifically, the procurement of subcontractors, leases or rentals above SGD100,000 required the prior approval of the Chief Financial Officer of Pan Asia Logistics Singapore Pte Ltd and the respondent's legal team. The respondent had an existing tenancy of certain units in a storage space known as Mapletree Logistics Hub-Shah Alam ('MLHSA'), one of those units being unit 1.7. The main landlord of some of the units in MLHSA including unit 1.7 was Winning Paramount Sdn Bhd ('WPSB'). By an email, PAL International's Director of Supply Chain Management expressly informed that the first appellant was not approved to enter into any long-term tenancy agreement for fixed rented spaces. Between August 2018 and October 2018, the first appellant negotiated with CESB for the procurement of a long-term tenancy storage space at MLHSA ('unit 1.4'). Without the knowledge and/or prior consent of the respondent, the first appellant caused the senior manager operation contract logistics of the respondent to sign on the first appellant's behalf the subtenant agreement between the respondent and CESB in respect of unit 1.4 ('the subtenant agreement'). The first appellant had also exerted pressure upon the operation manager of the respondent to witness the signing of the subtenant agreement. As a result of the signing the subtenant agreement,

A the respondent was contractually bound to pay rentals on an inflated rental rate of over 40% above the market rate of rental for unit 1.4 as well as highly disadvantageous termination terms. To mitigate the unfavourable terms of the subtenant agreement, the respondent had to enter into a novation agreement with WPSB and CESB. WPSB had in fact granted CESB, in respect of B unit 1.4, a pre-contract rent-free access to unit 1.4 from 12 October 2018–31 January 2019 and further fit out rent-free period from 1 March 2019–30 April 2019 ('the rent-free period'). According to the respondent's witnesses, these terms were never disclosed to the respondent and therefore the respondent suffered a loss of opportunity to secure the rent-free period from C WPSB totalling RM235,358.92. A forensic report showed that the first appellant was the creator and original author of various documents containing CESB's letterhead which were used in the transaction leading up to the subtenant agreement. The respondent had filed this suit against the appellants for damages in respect of breach of the first appellant's fiduciary duties and duty D of care as an employee of the respondent and in conspiracy with the second appellant which resulted in losses to the respondent and wrongful gains to CESB. The sessions court held that the appellants were liable to the respondent and awarded, inter alia: (a) special damages in the amount of RM235,358.92 E being the amount of loss of opportunity for the rent-free period; (b) special damages in the amount of RM10,800 in relation to the forensic report; and (c) general damages in the amount of RM40,000. The appellants appealed against the entirety of the sessions court's decision.

F **Held:**

(1) The sessions court judge's ('SCJ') findings of fact were supported by the evidence in the case. The SCJ's factual decision: (a) was supported by the contemporaneous documentary evidence and forensic expert evidence G adduced during trial; and (b) on liability was a decision which a reasonable trial judge would have made. There was no valid or sufficient basis for the court sitting on appeal to disturb or interfere with the SCJ's decision on liability. As such, the appellants' appeal on liability issues was dismissed (see paras 31, 33 & 35).

H (2) The SCJ's assessment and award of the special damages were supported by documentary evidence as well as the oral evidence of the witnesses. The SCJ had adequately considered both parties' evidence and submissions and had in fact rejected a majority of the respondent's claims for special damages. The SCJ had not acted on any wrong principle of I law, or had misapprehended the facts, or had failed to consider the relevant matters in assessing and awarding the special damages to the respondent. Therefore, there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with the SCJ's decision and award on special damage (see paras 37–39).

(3) Any award of general damages over and above the awarded special damages would offend the principle that damages were meant to compensate but not to unjustly enrich or give a profit element to the aggrieved party. The SCJ erred in principle in awarding RM40,000 as general damages over and above the special damages of RM235,358.92 and RM10,800 awarded. The court sitting as an appellate court was justified in intervention. Thus, the sessions court's award of RM40,000 as general damages was set aside (see paras 42, 45, 48–53 & 55).

[Bahasa Malaysia summary

Perayu pertama ialah pengarah urusan responden, manakala perayu kedua ialah isteri perayu pertama dan pengarah serta pemegang saham Cargo Elements Sdn Bhd ('CESB'). Responden yang sebelum ini dikenali sebagai Pan Asia Logistics Malaysia Sdn Bhd ('PAL Malaysia') merupakan anak syarikat Pan Asia Logistics International Pte Ltd ('PAL International'). Perayu pertama terikat dengan terma dan syarat yang terkandung dalam kontrak pekerjaan termasuk perwakilan kuasa responden ('DOA'). Di bawah DOA, kelulusan awal mesti diperoleh sebelum sebarang perbelanjaan, projek atau penglibatan pihak luar boleh ditanggung atau dilakukan. Khususnya, perolehan subkontraktor, pajakan atau sewaan melebihi SGD100,000 memerlukan kelulusan terlebih dahulu daripada Ketua Pegawai Kewangan Pan Asia Logistics Singapore Pte Ltd dan pasukan undang-undang responden. Responden mempunyai penyewaan sedia ada unit tertentu dalam ruang simpanan yang dikenali sebagai Hab Logistik Mapletree-Shah Alam ('MLHSA'), salah satu daripada unit tersebut ialah unit 1.7. Tuan tanah utama beberapa unit di MLHSA termasuk unit 1.7 ialah Winning Paramount Sdn Bhd ('WPSB'). Melalui e-mel, Pengarah Pengurusan Rantaian Bekalan PAL International dengan jelas memaklumkan bahawa perayu pertama tidak diluluskan untuk membuat sebarang perjanjian penyewaan jangka panjang untuk ruang sewa tetap. Antara Ogos 2018 dan Oktober 2018, perayu pertama berunding dengan CESB untuk perolehan ruang simpanan penyewaan jangka panjang di MLHSA ('unit 1.4'). Tanpa pengetahuan dan/atau kebenaran responden terlebih dahulu, perayu pertama menyebabkan pengurus kanan logistik kontrak operasi responden menandatangani bagi pihak perayu pertama perjanjian sub-penyewa antara responden dan CESB berkenaan dengan unit 1.4 ('perjanjian sub-penyewa'). Perayu pertama juga telah memberi tekanan kepada pengurus operasi responden untuk menyaksikan menandatangani perjanjian sub-penyewa. Hasil daripada menandatangani perjanjian sub-penyewa, responden terikat secara kontrak untuk membayar sewa pada kadar sewa yang melambung melebihi 40% melebihi kadar sewa pasaran untuk unit 1.4 serta syarat penamatan yang sangat merugikan. Untuk mengurangkan syarat perjanjian sub-penyewa yang tidak menguntungkan, responden perlu membuat perjanjian novasi dengan WPSB dan CESB. WPSB sebenarnya telah memberikan CESB, berkenaan dengan unit 1.4, akses tanpa sewa pra-kontrak kepada unit 1.4 dari 12 Oktober 2018–31 Januari 2019 dan

A seterusnya menyediakan tempoh tanpa sewa dari 1 Mac 2019–30 April 2019 ('tempoh tanpa sewa'). Menurut saksi responden, syarat-syarat ini tidak pernah didedahkan kepada responden dan oleh itu responden mengalami kehilangan peluang untuk mendapatkan tempoh tanpa sewa daripada WPSB berjumlah RM235,358.92. Laporan forensik menunjukkan bahawa perayu pertama B adalah pencipta dan pengarang asal pelbagai dokumen yang mengandungi kepala surat CESB yang digunakan dalam transaksi yang membawa kepada perjanjian sub-penyewa. Responden telah memfailkan saman ini terhadap perayu untuk ganti rugi berkenaan dengan pelanggaran kewajipan fidusiari dan kewajipan berjaga-jaga perayu pertama sebagai pekerja responden dan C berkonspirasi dengan perayu kedua yang mengakibatkan kerugian kepada responden dan keuntungan yang salah kepada CESB. Mahkamah sesyen memutuskan bahawa perayu bertanggungjawab kepada responden dan memberi award, antara lain: (a) ganti rugi khas berjumlah RM235,358.92 D iaitu jumlah kehilangan peluang untuk tempoh tanpa sewa; (b) ganti rugi khas berjumlah RM10,800 berhubung dengan laporan forensik; dan (c) ganti rugi am berjumlah RM40,000. Perayu merayu terhadap keseluruhan keputusan mahkamah sesyen.

E **Diputuskan:**

(1) Penemuan fakta hakim mahkamah sesyen ('HMS') disokong oleh keterangan dalam kes. Keputusan fakta HMS: (a) disokong oleh keterangan dokumentari semasa dan keterangan pakar forensik yang dikemukakan semasa perbicaraan; dan (b) mengenai liabiliti adalah F keputusan yang akan dibuat oleh hakim bicara yang munasabah. Tiada asas yang sah atau mencukupi untuk mahkamah bersidang dalam rayuan untuk mengganggu keputusan HMS mengenai liabiliti. Oleh itu, rayuan perayu mengenai isu liabiliti telah ditolak (lihat perenggan 31, 33 & 35).

G (2) Penilaian HMS dan award ganti rugi khas disokong oleh keterangan dokumentari serta keterangan lisan saksi. HMS telah mempertimbangkan secukupnya keterangan dan hujahan kedua-dua pihak dan sebenarnya telah menolak majoriti tuntutan responden untuk ganti rugi khas. HMS tidak bertindak atas mana-mana prinsip H undang-undang yang salah, atau telah salah memahami fakta, atau telah gagal untuk mempertimbangkan perkara yang berkaitan dalam menilai dan memberikan ganti rugi khas kepada responden. Oleh itu, tidak ada asas yang sah atau mencukupi untuk mahkamah ini bersidang dalam rayuan untuk mengganggu keputusan HMS dan award ganti rugi khas I (lihat perenggan 37–39).

(3) Sebarang award ganti rugi am melebihi ganti rugi khas yang diawardkan akan menyalahi prinsip bahawa ganti rugi bertujuan untuk membayar pampasan tetapi bukan untuk memperkaya atau memberi unsur keuntungan kepada pihak yang terkilan secara tidak adil. HMS terkilaf

pada dasarnya dalam memberikan RM40,000 sebagai ganti rugi am melebihi ganti rugi khas RM235,358.92 dan RM10,800 yang diberikan. Mahkamah yang bersidang sebagai mahkamah rayuan adalah wajar untuk campur tangan. Oleh itu, award mahkamah sesyen sebanyak RM40,000 sebagai ganti rugi am telah diketepikan (lihat perenggan 42, 45, 48–53 & 55).]

Cases referred to

B (a child), Re [2013] UKSC 33, SC (refd)
Collector of Stamp Duties v Ng Fah In & Ors [1981] 1 MLJ 288, FC (refd)
Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601, HL (refd)
Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141, FC (refd)
Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v Ahmad Thaqif Amzar bin Ahmad Huzairi (claiming through mother and her litigation representative, Majdah bt Mohd Yusof) and other appeals [2023] 1 MLJ 281; [2022] 10 CLJ 209, CA (refd)
Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (refd)
Lim Choon Seng v Lim Poh Kwee [2020] 5 MLJ 587; [2020] 9 CLJ 1, FC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 1 LNS 1060, FC (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39, HC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (distd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)

Noor Syuhada bt Hassim (Adrian, Syuhada, Sia & Assoc) for the appellants.
Trevor Padasian @ Mark Jason (Skrine) for the respondent.

Tee Geok Hock J:

INTRODUCTION

[1] The respondent/plaintiff has filed the present suit against the appellants/defendants for or damages in respect of breach of the first appellant/Chang's fiduciary duties and duty of care as employee of the respondent/plaintiff and in conspiracy with his wife the second appellant/Feng which resulted in losses to the respondent/plaintiff and wrongful gains to the second appellant/Feng's company. In the statement of claim, the respondent/plaintiff commenced the present suit against Chang and Feng claiming for, amongst others: (1) special damages amounting to RM759,439.50; (2) further or alternatively, general damages incurred by the

A respondent to be assessed by this honourable court; (3) pre-judgment interest on RM759,439.50 and general damages to be assessed at the rate of 5%pa calculated from the date of payment to the date of judgment or interest at such rate and period deemed fit by this honourable court; and (4) costs on a solicitor-client basis.

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[2] After a full trial 11 days and after hearing 11 witnesses at the sessions court, the sessions court held that there appellants/defendants were liable to the respondent/plaintiff and the sessions court awarded damages on several heads of claims against the appellants/defendants as follows:

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(a) special damages in the amount of RM235,358.92 being the amount of loss of opportunity for the rent-free period;

(b) special damages in the amount of RM10,800 in relation to the forensic report;

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(c) general damages in the amount of RM40,000;

(d) interest of 5%pa on the judgment sum from the date of the filing of writ summons until the date of full payment; and

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(e) costs of the trial is fixed at the amount of RM20,000 to be paid by the appellants to the respondent.

(See the record of appeal (Part A) (Vol 1), pp 85–86 (judgment dated 22 February 2023).)

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[3] The appellants/defendants appealed against the entirety of the sessions court's decision.

[4] On appeal, this court on 22 June 2023 dismissed the defendants' appeal on liability issues but allowed partly the appeal on damages and quantum of damages, thereby reducing the quantum of awarded damages by ordering that the award of general damages be set aside. This court also ordered that the respondent/plaintiff shall costs of appeal in the sum of RM4,000 to the appellants/defendants.

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[5] The appellants/defendants have appealed against this court's decision dated 22 June 2023 insofar as it relates to dismissal of the liability appeal and dismissal of the appeal on awards of special damages.

I

PRINCIPLES OF APPELLATE INTERVENTION

[6] The principles on appellate interference that can be gleaned from the case authorities can be summarised as follows:

(a) an appellate court should not interfere with the trial judge's findings of fact unless the trial judge has erred in principle or was plainly wrong in making such findings; A

(b) 'When it comes to an evaluation, the extent to which the benefit of hearing the witnesses and watching the evidence unfold will result in the trial judge having a particular advantage over an appellate tribunal will vary from case to case. Accordingly, it is not possible to lay down any single clear general rule as to the proper approach for an appeal court to take where the appeal is against an evaluation …': per Lord Neuberger's remarks at para 60 of *Re B (a child)* [2013] UKSC 33 cited with approval by Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at para 144; B C

(c) the mere fact that the appellate court would have come to a different conclusion on the evidence is not a ground for interference with factual decision except where the decision of the trial court was based entirely on inferences to be drawn from the proved facts (as opposed to findings which involved the issue of the credibility of the witnesses), in which case the appellate court would be placed in the same position as the trial court: per Abdul Rahman Sebli FCJ (now CJ (Sabah and Sarawak)) in *Lim Choon Seng v Lim Poh Kwee* [2020] 5 MLJ 587; [2020] 9 CLJ 1 at para 83; D E

(d) the principle on which an appellate court could interfere with findings of fact by the trial court is the 'plainly wrong' test, in the sense that the finding cannot reasonably be explained or justified and so is one which no reasonable judge could have reached; and that if the appellate court is not satisfied that the decision suffers from that infirmity, it is irrelevant that with whatever degree of certainty, it would have considered that it would have reached a different conclusion from that of the trial judge: per Abdul Rahman Sebli FCJ (now CJ (Sabah and Sarawak)) in *Lim Choon Seng v Lim Poh Kwee* at para 82; F G

(e) it is not sufficient for the appellate court to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at para 151; H I

(f) to justify interference with the trial judge's findings of fact, the appellate court has to make the appropriate determination that the trial judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. Unless the conclusion that the trial judge drew from it was one that no reasonable judge would have made, his conclusion on the point should be left undisturbed: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at para 152;

(g) rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the plainly wrong test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at para 148;

(h) apart from the above examples and general statements of principles, the application of the plainly wrong test by an appeal court in reversing the findings of facts by a trial court should be subject to any fixed or rigid guidelines: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at para 148;

(i) in an appeal against award of damages or compensation, the appellate court may intervene where it is satisfied that the trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered: House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at pp 616–617, followed in *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288 at p 292A to be a wholly wrong estimate of the damages, the amount awarded must manifestly be either excessively high or excessively low; and

(j) an omission on the part of the trial judge to consider some relevant matters or he had admitted for the purpose of assessment some irrelevant considerations or a misdirection of law are examples of having acted on a wrong principle of law or having misapprehended the facts which justifies appellate interference on the award of damages or the

quantum of damages: Federal Court in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 followed by the Court of Appeal in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 at p 682 para 16.

LIABILITY ISSUES

[7] In our present case, the learned sessions court judge found the defendants liable to the plaintiff.

[8] The learned sessions court judge's decision on liability is in essence a factual decision based on his findings of fact and after having heard the evidence of witnesses and after having the advantage of observing the demeanour of the witnesses.

[9] In the process of making the findings of fact and in arriving at the decision on liability, the learned sessions court judge has not erred in principle.

[10] In of the grounds of judgment, the learned sessions court judge has briefly analysed the evidence of the witnesses and also the documentary evidence before coming to the factual conclusion that defendants were liable to the plaintiff.

[11] The evidence including documentary evidence adduced at the trial include, among others, the items in the following paragraphs.

[12] The respondent which was previously known as Pan Asia Logistics Malaysia Sdn Bhd ('PAL Malaysia') was at all material times a subsidiary company of Pan Asia Logistics International Pte Ltd ('PAL International') (see the record of appeal (Part B) (Vol 4), p 487 (notes of evidence dated 11 January 2022).

[13] The first appellant ('Chang') was at all material times between 1 November 2014 and 11 February 2019 an employee of the respondent and served as the managing director of the respondent (see the record of appeal (Part C(1)) (Vol 15), pp 1982–1991 (employment contract dated 22 October 2014); see the record of appeal (Part B) (Vol 8), p 1038 (notes of evidence dated 25 May 2022); record of appeal (Part B) (Vol 8), pp 1042–1043 (notes of evidence dated 25 May 2022); the record of appeal (Part B) (Vol 9), pp 1238 and 1240 (Chang Sen Pong Eddie's witness statement dated 30 June 2020)).

[14] It was testified that Chang was reporting to the Chief Executive Officer of Pan Asia Logistics Singapore Pte Ltd ('PAL Singapore') at headquarters in Singapore, who was Gerald Tan until 27 November 2019 and was then

A replaced by Rickard Heiss (see the record of appeal (Part B) (Vol 9), p 1214 (Chin Chou Lin's witness statement dated 30 June 2020)).

[15] According to the contemporaneous documentary evidence, Chang was bound by the terms and conditions contained in the employment contract B dated 22 October 2014 ('employment contract') including the two subsequent addenda attached to the employment contract, the respondent's employee handbook (exh P27) and the respondent's delegation of authority dated 11 January 2018 ('DOA') (see the record of appeal (Part B) (Vol 3), pp 309–310 (notes of evidence dated 9 September 2020)).

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[16] Under the DOA, prior approval must be obtained before any expenditure, projects or engagements of external parties could be incurred or committed. Specifically, the procurement of subcontractors, leases or rentals above SGD100,000 required the prior approval of the Chief Financial Officer D of PAL Singapore and prior approval of the respondent's legal team (see the record of appeal (Part C(1)) (Vol 15), p 2011 (DOA issued by PAL Singapore dated 11 January 2018)).

E **[17]** It was undisputed fact that the second appellant ('Feng') was at all material times the wife of Chang and was a director and shareholder of Cargo Elements Sdn Bhd ('CESB') (see the record of appeal (Part B) (Vol 7), pp 956–957, and 978–979 (notes of evidence dated 19 May 2022)).

F **[18]** The search reports from SSM showed that CESB was incorporated on 10 October 2018 by Feng and Mr Navinthran a/l Vengadasamy ('Navinthran'), who was also a director and shareholder of CESB (see the record of appeal (Part C(1)) (Vol 15), p 1964 (company search of CESB dated 10 October 2018; see also the record of appeal (Part B) (Vol 7), pp 973–974 G (notes of evidence dated 19 May 2022)).

[19] Indisputable and cogent documentary evidence shows that Feng owned 50% of the shares in CESB and Navinthran owned the other 50% of shares in CESB (see the record of appeal (Part C(1)) (Vol 15), p 1965 (company search H of CESB dated 10 October 2018)).

[20] The respondent had an existing tenancy of certain units in a storage space known as Mapletree Logistics Hub-Shah Alam ('MLHSA'), one of those units being unit 1.7 (see the record of appeal (Part B) (Vol 9), p 1294 (Hng I Jiunn Kiat's amended witness statement dated 30 June 2020)).

[21] The main landlord of some of the units in MLHSA including unit 1.7 was Winning Paramount Sdn Bhd ('WPSB'). The respondent would occasionally negotiate and enter into tenancy agreements with WPSB for the

MLHSA Units (see the record of appeal (Part B) (Vol 9), p 1295 (Hng Jiunn Kiat's amended witness statement dated 30 June 2020)). A

[22] By email on 29 August 2018 (exh D120), Philip Choong Siaw Chiang, PAL International's Director of Supply Chain Management expressly informed Chang that Chang was not approved to enter into any long-term tenancy agreements for fixed rented spaces. The reason was that, at the material time, the need for storage space was only due to a temporary overflow of goods from the customer and it was not in the best interest of respondent to commit to a long-term storage given that such overflows will normalise on its own (see the record of appeal (Part C(1)) (Vol 20), p 2817 (email from Philip Choong Siaw Chiang to Kumarendran and cc-ed to Eddie Chang, Daniel Suresh a/l Arumugam dated 29 August 2018)) (see also the record of appeal (Part B) (Vol 9), pp 1295–1296 (Hng Jiunn Kiat's amended witness statement dated 30 June 2020)). B C D

[23] Between August 2018 and October 2018, Chang negotiated with CESB for the procurement of a long-term tenancy storage space at MLHSA ('unit 1.4') for a term of two years at the rental rate of RM133,497.50 per month commencing on 13 October 2018. According to the respondent/plaintiff's witnesses, this was done without the knowledge and/or prior consent of the respondent. At the trial, the defendants could not produce any documentary evidence to show there was any consent or knowledge on the part of the respondent/plaintiff regarding such negotiations (see the record of appeal (Part B) (Vol 8), pp 1044, 1054–1055, 1056, and 1115–1116 (notes of evidence dated 25 May 2022)) (see also the record of appeal (Part C(1)) (Vol 18), p 2402 and record of appeal (Part C(1)) (Vol 20), pp 2823–2826 (email dated 12 December 2018 from Eddie Chang explaining to Rickard Heiss on the reason the subtenancy for unit 1.4 was taken up)). E F G

[24] Without the knowledge and/or prior consent of the respondent, on or about 12 October 2018, Chang caused Mr Kumarendran Subramaniam ('Kumarendran'), the Senior Manager Operation Contract Logistics of the respondent, to sign on Chang's behalf the subtenant agreement dated 12 October 2018 between the respondent and CESB in respect of unit 1.4 ('subtenant agreement'). According to the respondent/plaintiff's witness, Mr Kumarendran was coerced or unduly pressured by Chang to sign the subtenant agreement (exh D130) (see the record of appeal (Part C(1)) (Vol 14), pp 1913–1933 (subtenant agreement dated 12 October 2018)) (see the record of appeal (Part B) (Vol 6), pp 794, 798, and 814 (notes of evidence dated 13 May 2022)) (see also the record of appeal (Part B) (Vol 8), p 1062 (notes of evidence dated 25 May 2022)). H I

[25] On or about 12 October 2018, Chang had also exerted pressure upon Ms Pauline Phang Fong Ling ('Pauline'), the operation manager of the respondent, to witness the signing of the subtenant agreement by Kumarendran (see the record of appeal (Part B) (Vol 3), p 388 (notes of evidence dated 23 February 2021)).

[26] As a result of the signing of the subtenant agreement, the respondent was contractually bound to pay rentals and on terms which, according to the respondent/plaintiff, was an inflated rental rate of over 40% above the market rate of rental for unit 1.4 as well as highly disadvantageous termination terms. Moreover, there was no evidence of written communication about the taking up of the subtenancy of unit 1.4 with CESB from Chang to PAL International.

[27] In October 2018, the respondent moved into unit 1.4 and established its warehousing operations (see the record of appeal (Part A) (Vol 1), para 18 at p 143 (statement of claim dated 5 August 2019)).

[28] To mitigate the unfavourable terms of the subtenant agreement, the respondent had to enter into a novation agreement dated 25 February 2019 ('novation agreement') (exh P26) in respect of unit 1.4 which was signed by WPSB as the 'Landlord', CESB as the 'Existing Tenant' and the respondent as the 'Substitute Tenant' (see the record of appeal (Part C(1)) (Vol 17), pp 2364–2368 (novation agreement between CESB, WPSB, and PAL Malaysia dated 25 February 2019)) (see also the record of appeal (Part B) (Vol 9), p 1299 (Hng Jiunn Kiat's amended witness statement dated 30 June 2020)).

[29] WPSB had in fact granted CESB a pre-contract rent-free access to unit 1.4 from 12 October 2018–31 January 2019 and further fit out rent-free periods from 1 March 2019–30 April 2019 for unit 1.4. According to the plaintiff's witnesses, these terms were never disclosed to the respondent and therefore the respondent suffered a loss of opportunity to secure a rent-free period from 1–30 March 2019 from WPSB totalling RM235,358.92 (see the record of appeal (Part C(1)) (Vol 19), p 2577 (item 12 of the first schedule of the tenancy agreement between CESB and WPSB for unit 1.4 dated 22 January 2019)).

[30] A digital forensic reporting — final report v1.0 (project PALM) dated 21 April 2019 (exh P3) ('forensic report') prepared by Akash Rosen, the founder of OG IT Forensic Services, showed that Chang was the creator and original author of various documents containing CESB's letterhead ('CESB documents') which were used in the transaction leading up to the subtenant agreement (see the record of appeal (Part C(1)) (Vol 18), pp 2369–2376 (forensic report prepared by Akash Rosen dated 21 April 2019)) (see the record

of appeal (Part B) (Vol 4), pp 404–405 (notes of evidence dated 12 March 2021)) (see also the record of appeal (Part B) (Vol 8), pp 1066–1072, and 1091–1097 (notes of evidence dated 25 May 2022)).

[31] Having perused the evidence, this court came to the conclusion that:

(a) the learned trial judge's findings of fact are supported by the evidence in the case;

(b) the learned trial judge's factual decision is also supported by contemporaneous documentary evidence and forensic expert evidence adduced at the trial; and

(c) the learned trial judge's factual decision on liability is a decision which a reasonable trial judge would have made.

[32] In the circumstances, this case fell below the 'plainly wrong' test for an appellate interference with the trial judge's findings of fact and the trial judge's factual decision on liability.

[33] In the premises, based on the legal principles stated in para 1 above, this court has held that there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with the learned trial judge's decision on liability.

[34] Even if this court were to assess and analyse the evidence afresh on a balance of probabilities as a trial judge, this court would still have come to the same conclusion as the sessions court judge here.

[35] In the premises, this court found that on the liability issues and decision there is no valid or sufficient basis for an appellate intervention. As such, the appellants/defendants' appeal on liability issues is dismissed.

DAMAGES AND QUANTUM ISSUES

Special damages

[36] In the assessment and award of special damages, the sessions court judge has not erred in principle. Neither has he misapprehended the facts nor has he failed take into consideration the relevant facts.

[37] The sessions court judge's assessment and award of the special damages are supported by documentary evidence as well as the oral evidence of the witnesses. In his assessment and award of the special damages, the trial judge has adequately considered both parties' evidence and submissions and has in fact rejected a majority of the plaintiff's claims for special damages.

A **[38]** In the circumstances of the present case, this court is not satisfied that the trial judge has acted on any wrong principle of law, or has misapprehended the facts, or has failed to consider the relevant matters in assessing and awarding the special damages on the two items to the plaintiff.

B **[39]** In the premises, based on the legal principles stated in para 1 above, this court has held that there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with the learned trial judge's decision and award on special damages in the present case.

C *General damages*

[40] In addition to the award of special damages, the trial judge has also awarded an amount of RM40,000 as general damages.

D **[41]** In a case on breach of contract or tort, the plaintiff who succeeds in liability will be awarded the special damages which he has specifically pleaded and specifically proved to have been caused by the breach of contract or tortious wrong.

E **[42]** As a general rule, it is only where the plaintiff who succeeds in liability is unable to specifically prove his special damages that the court will award him with nominal damages (for a case of breach of contract) or general damages (for a case of tortious wrong).

F **[43]** Nominal in this context does not mean miniscule in amount, but a relatively small amount in the context of the nature and extent of the breach.

G **[44]** In exceptional circumstances, aggravated damages may be awarded in a case of serious and deliberate breach of contract with intention that the wrongdoer's profits to be derived from the breach would far exceed the plaintiff's special damages. Exemplary damages are only awarded in two categories of exceptional cases: see the decision of the Federal Court in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141, the Federal Court referred to the case of *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39. However, the nature and character of the present case here do not fall within those two exceptional categories.

H

I **[45]** In our present case, the trial judge did not find any exceptional circumstance and also did not award any aggravated damages. What the trial judge awarded was general damages of RM40,000 over and above the special damages which was proven and awarded.

[46] In the respondent's submission, the Court of Appeal's decision in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 was cited to support the sessions court judge's award of RM40,000 as general damages here.

[47] In the considered view of this court, the material facts in the Court of Appeal's decision in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* can be distinguished from the facts of our present case on the following grounds:

(a) *Sambaga Valli* case relates to wrongful demolition of business remises and seizure of trading goods by a local authority, and not a breach of contract between two private entities;

(b) in *Sambaga Valli*, the plaintiff was an individual person, whereas the plaintiff in our present appeal is a limited company; and

(c) in *Sambaga Valli*, the Court of Appeal awarded RM55,000 for mental stress and trauma suffered by the individual plaintiff and her family due to the wrongful raid and seizure by a local authority resulting in closure of her business; here in our appeal, there is no question of a corporate plaintiff suffering mental stress and trauma.

[48] On the facts of the present case as found by the trial judge, there is no legal basis to award RM40,000 as general damages over and above the special damages of RM235,358.92 and RM10,800 awarded.

[49] In the recent case of *Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v Ahmad Thaqif Amzar bin Ahmad Huzairi (claiming through mother and her litigation representative, Majdah bt Mohd Yusof) and other appeals* [2023] 1 MLJ 281; [2022] 10 CLJ 209 the Court of Appeal held as follows regarding the principle on assessment of damages:

> [53] Before concluding on SD, we must state that the LJ had correctly adopted the established principle on the assessment of damages that the court must be mindful that *damages serve as a compensation and are not meant to unjustly enrich the claimant nor punish the wrongdoer. The damages must be fair, adequate and not excessive based on cogent evidence before the court* (see *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292; [1981] 1 LNS 106; *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300; *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885). It is important to reiterate that damages for personal injuries are neither intended to be punitive nor a reward but purely compensatory.

[50] Following the appellate courts' decisions on the principle on award of damages, this court has held that any award of general damages over and above

A the awarded special damages in the factual scenario of the present case would offend the principle that damages are meant to compensate but not to unjustly enrich or give a profit element to the aggrieved party.

B **[51]** In the premises, this court has held that the trial judge erred in principle in awarding RM40,000 as general damages over and above the special damages of RM235,358.92 and RM10,800 awarded.

[52] Hence, this court sitting as an appellate court is justified in intervention insofar as the award of general damages of RM40,000 is concerned.

C

[53] By reason of the above, the sessions court's award of RM40,000 as general damages was set aside by this court.

CONCLUSION

D

[54] In conclusion, this court has dismissed the appellants/defendants' appeal on liability but allowed in part their appeal on quantum, and has thereby ordered that the sessions court judge's award of RM40,000 as general damages be set aside. The awards on the special damages have been affirmed by this court.

E

[55] As the appellants/defendants has succeed in part of their appeal, this court has also awarded part of the costs of appeal to them, and has assessed the awarded costs at RM4,000, subject to allocator.

F

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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I